DOCKET FILE COPY ORIGINAL

ORIGINAL

Vinson&Elkins
ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
THE WILLARD OFFICE BUILDING
1455 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20004-1008
TELEPHONE (202) 639-6500
FAX (202) 639-6604
www.velaw.com

Gregory C Staple
Direct Dial 202-639-6744
Direct Fax 202-879-8944
gstaple@velaw.com

April 9, 2003

Via Hand Delivery

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
c/o Vistronix, Inc.
236 Massachusetts Avenue, NE, Suite 110
Washington, D.C. 20002

RECEIVED

APR - 9 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: IB Docket No. 03-38

Dear Ms. Dortch,

Transmitted herewith, on behalf of ABS-CBN Telecom North America, Inc. and Bayan Telecommunications, Inc. are an origmal and four copies of an Application for Review in the above-captioned proceeding.

Also enclosed is a copy of the filing marked "Stamp and Return," which I would appreciate your stamping and returning to my attention via my messenger.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

Gregory C. Staple

Enclosures

No. of Copies rec'd 0+4
List ABCDE

236921-1.DOC

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

APR - 9 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
AT&T Corp. Emergency Petition for	)	
Settlements Stop Payment Order	)	
and Request for Immediate Interim Relief	)	IB Docket No. 03-38
	)	
and	)	
	)	
Petition of WorldCom, Inc.	)	
For Prevention of "Whipsawing"	)	
On the U.S.-Philippines Route	)	

To: The Commission

APPLICATION FOR REVIEW

ABS-CBN TELECOM NORTH AMERICA, INC
BAYAN TELECOMMUNICATIONS, INC.

April 9, 2003

SUMMARY

The International Bureau's decision to re-regulate *all* U.S. carrier settlement agreements for telephone services with the Philippines is wholly at odds with the Commission's oft-stated commitment to let market forces and technological innovation, rather than regulatory fiat, resolve pricing disputes between international camers that lack market power. The Bureau's Order — which treats U.S. carrier agreements with dominant and Competitive foreign carriers alike — also represents a dangerous departure from the Commission's decade-long effort to stop micro-managing international settlement agreements amongst competitive carriers. If not reversed, or modified in a pro-competitive fashion, the Order will only invite foreign regulators to retaliate (as, in fact, has already happened in the Philippines) to the potential detriment of U.S. carriers and consumers alike.

ABS-CBN Telecom is a small Filipino-oriented U.S. carrier that connects approximately 1% of US.-originated telephone calls to the Philippines. It is affiliated with Bayantel, a competitive Philippine international carrier that serves approximately 200,000 local exchange lines or roughly 1% of the total base of fixed and mobile telephone subscribers in the Philippines.

In a hasty effort to provide AT&T and WorldCom relief from the alleged disruption of their services by the dominant Philippine carrier, PLDT, and without considering the timely comments of smaller carriers, such as ABS-CBN Telecom and Bayantel, the Bureau adopted a stop payment order that is unnecessarily overbroad and anti-competitive. First, in fashioning the order, the Bureau wrongly lumped ABS-CBN Telecom together with the two major U.S. carriers serving the Philippine route. This served no purpose because the addition of ABS-CBN Telecom's ***de** minimis* contribution to the pool of suspended funds could not conceivably affect the balance of negotiations between AT&T (or WorldCom) and PLDT. There were also special

circumstances in ABS-CBN's case that warranted a waiver of the remedial provisions of any order applicable to AT&T and WorldCom (e.g., the unusual dependency of ABS-CBN Telecom on U.S.-Philippine traffic coupled with its ***de** minimis* 1% overall market share).

Second, the Bureau compounded the anti-competitive impact of its Order by retroactively abrogating most existing interconnection contracts between U.S. and Philippine carriers as of February 1,2003, without prior notice or an opportunity for comment, and then imposing an intrusive set of new contract terms, known as the International Settlements Policy (ISP). The Bureau took this further step even though neither AT&T nor WorldCom had requested the reimposition of the ISP on U.S.-Philippine interconnection agreements, and although the Commission itself, following appropriate notice and comment, had determined in the 1999 *ZSP* ***Reform Order*** that consumer interests were best served by not requiring ISP-based terms for U.S. carrier contracts with non-dominant foreign carriers, such as Bayantel.

The Bureau's summary reinstatement of the ISP for all U.S. carrier contracts with Bayantel, among others, also circumvented a pending Commission rulemaking docket that has yet to resolve the very question which the Bureau jumped in to answer, namely, what standards the Commission should follow for reimposing ISP obligations upon carrier contracts. Thus, the ISP provisions in the Order are flatly inconsistent with the FCC's existing rules and exceeded the Bureau's authority, especially as to U.S. carrier contracts with competitive Philippine carriers like Bayantel.

Beyond that, the Bureau's decision to reimpose the ISP's cartel-like settlement provisions on all U.S. carriers was not required to address the specific complaints before the Bureau. The stop-payment order issued by the Bureau provided major U.S. carriers with adequate new negotiating power given that net annual U.S. carrier payments to Philippine carriers have historically exceeded $200 million. The reimposition of the ISP is also quite impractical (e.g., among other implementation hurdles, there is no public source of data on the relevant outbound traffic base of **U.S.** carriers **as** of January 31,2003 that can be used to establish a metric for the proportional return of inbound traffic from February 1,2003 forward, as the ISP requires).

While the Bureau obviously is entitled to protect U.S. carriers and consumers from anti-competitive "whipsawing" by foreign camers, basic principles of due process preclude a rush to judgment, as plainly happened here, based exclusively upon evidence proffered by one party, here AT&T, when the key facts are disputed on the record. The Bureau's conclusion that Bayantel "whipsawed" AT&T, and therefore should be subject to the same remedial provisions of the order as PLDT, depends solely upon three factual allegations of AT&T, all of which were rebutted, though the Order completely ignores the rebuttal evidence:

- The Order concludes (at ¶ 12) that Bayantel blocked a "substantial part" of AT&T's circuits, but ABS-CBN Telecom provided a sworn affidavit from Bayantel to the contrary. (Significantly, AT&T has since advised the Bureau that Bayantel has ceased blocking its traffic, although no unlawful blocking ever actually occurred.)
- The Order states (at ¶ 17 n.81) that Bayantel acted in concert with other carriers in demanding a uniform price increase and retaliating unless AT&T paid an increased settlement rate, but correspondence submitted to the Bureau showed that Bayantel did not threaten to block AT&T traffic destined for Bayantel if it did not pay increased settlement charges.
- The Order also maintains that Bayantel acted in concert with other Philippine carriers because Bayantel entered into a domestic interconnection agreement that provided for increased rates for transiting international traffic during the same month that Globe entered into like agreements with PLDT and other carriers. But ABS-CBN Telecom advised the Bureau that the Globe agreement did not mandate any particular settlement rate for the termination of AT&T's international traffic on Bayantel's network; it only covered domestic termination charges for other networks. Further, non-discriminatory domestic

interconnection agreements (*i.e.*, parallel agreements between Philippine domestic carriers) are required by local regulation.

Under these circumstances, the conclusion that Bayantel "whipsawed" AT&T was wrong and should be reversed and the remedy ordered by the Bureau — reimposition of the ISP on U.S. carrier contracts with Bayantel — should be lifted.

For all of the above reasons, if the Bureau's order is not vacated, the Commission should reform it by: (1) deleting Bayantel from the list of Philippine carriers subject to the ISP; and (2) granting ABS-CBN Telecom a waiver from all remedial provisions.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp. Emergency Petition for	)	
Settlements Stop Payment Order	)	
and Request for Immediate Interim Relief	)	IB Docket No. 03-38
	)	
and	)	
	)	
Petition of WorldCom, Inc.	)	
For Prevention of "Whipsawing"	)	
On the US.-Philippines Route	)	

To: The Commission

APPLICATION FOR REVIEW

ABS-CBN Telecom North America, Inc. ("ABS-CBN Telecom"), by its attorneys, and Bayan Telecommunications, Inc. (Bayantel), pursuant to Section 1.115 of the Commission's Rules,' hereby requests that the Commission promptly review and vacate the International Bureau's March 10,2003 Order ("*IB* ***Order")'*** in the above-captioned proceeding because it lacks adequate factual support and is contrary to prior Commission policy. At a minimum, to cure substantive defects, the FCC should reform the *IB Order* by: (1) exempting ABS-CBN Telecom from all remedial provisions; and (2) deleting Bayantel from the list of Philippine carriers with which U.S. carriers must negotiate new ISP-compliant agreements.

I. Preface

For over a decade, the Commission has sought to deregulate the provision of international telecommunications by "tap[ping] the power of digital technology and seiz[ing] the opportunities

---

[1] 47 **C.F.R.** § 1.115.
[2] *Order*, **DA** 03-581 (**rel**. Mar. 10,2003) ("*IB Order*").

created by . . . competition in other markets."[3] The *IB Order* threatens to reverse that course. From February 1,2003, the ZB *Order* mandates the same cartel-like interconnection contracts for all facilities-based U.S. carriers and most of their Philippine correspondents solely to resolve an impasse over the termination prices being negotiated by the two largest U.S. carriers, AT&T and WorldCom.

Given that telephone services between the United States and the Philippines are now provided directly by at least seventeen U.S. facilities-based carriers, ten Philippine camers and numerous Internet telephone providers, and indirect (i.e., third country) service is offered by scores of other operators, the Bureau's remedy is neither necessary nor practical. It is also bad policy. Digital technologies (e.g., Internet telephony) and competition (e.g., International Simple Resale, third country hubbing) provide many alternatives for any U.S. (or Philippine) camer that is dissatisfied with the traditional accounting rate regime which triggered the original AT&T and WorldCom complaints.

11. Background

A. Market Overview

The market for telephone services between the United States and the Philippines is one of the fastest growing and most competitive in the world. The volume of U.S.-billed switched telephone traffic increased approximately 300% between 1998 and 2001 alone to over **1.7** billion minutes, while average U.S. carrier settlement costs fell by two-thirds from $.32 to $. 12 per minute.[4] In other words, in 2001, Philippine carriers, on average, were terminating three minutes of U.S. traffic for approximately the same amount they received for every minute in 1998.

---

[3] *Policy Statement on International Accounting Rate Reform,* 11 FCC Rcd 3146,3146 (1996) *("Policy Statement").*

[4] *Compare* FCC, Statistics of Communications Common Carriers, 1998/1999, Table 4.1, *with* 2001 International Telecommunications Data, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC (Jan.

The increased traffic and decreased settlement costs on the US.-Philippines route are due in significant part to the liberalization of market entry at both ends of the route as well as the Commission's progressive deregulation of traditional interconnection terms between U.S. and Philippine carriers. The repeal of ISP-based agreements for traffic routed to non-dominant Philippine carriers, such as Bayantel, has been particularly important.

As the FCC concluded in its landmark 1996 ***Policy Statement*** on international accounting rate reform, "[i]n a time of rapid technological innovation, policy makers ought not to prescribe a single method for the supply and pricing of international services."[5] The Commission went on to state that its traditional settlement policies were "designed for a world characterized by bilateral negotiations between carriers with market power"[6] but that "[w]here markets are becoming competitive, the ISP "may impede competitive behavior and the development of effectively competitive markets."[7]

Drawing on this ***Policy Statement,*** and after an extensive opportunity for public comment, in 1999 the FCC adopted major reforms to its existing regulatory regime for international telecommunications services.' The reforms included the repeal of the **ISP** for all **U.S.** carrier contracts with foreign carriers lacking market power based on a "bright line" test — i.e., any foreign carrier with less than a 50% share in relevant foreign markets would be deemed to lack

2003), Table Al.

[5] ***Policy Statement,*** 11 FCC Rcd at 3146.

[6] ***Id.*** at 3150.

[7] ***Id.*** "For example," said the FCC, "our policy of requiring return traffic to be allocated proportionately among US. carriers may deter U.S. terminating carriers from offering innovative pricing and supply arrangements." ***Ibid.***

[8] 1998 ***Biennial Regulatory Review — Reform of the International Settlements Policy and Associated Filing Requirements,*** IB Docket No. 98-148, ***Report and Order and Order on Reconsideration,*** **14** FCC Rcd 7963 (1999) ("***ISP Reform Order***"). The FCC's rulemaking notice in that proceeding was issued in August 1998, approximately eight months before the FCC voted to amend its rules. ***See Notice of Proposed Rulemaking,*** 13 FCC Rcd 15320 (1998).

market power.' A list of foreign carriers not meeting this test was published simultaneously by the FCC.[10] It excluded all Philippine camers except PLDT.

In addition, the *ISP* ***Reform Order*** concluded that the competition would be best served by repealing the ISP altogether **on** routes where U.S. carriers terminate at least 50% of U.S. billed traffic at rates 25% or more below the "benchmark" settlement rates previously established by the FCC.[11] Significantly, in taking these deregulatory **steps,** the *ISP Reform* ***Order*** did not adopt any policy or rule for reimposing the ISP on any given route **or** carrier.[12]

The aforedescribed changes to the FCC's settlement rules significantly enhanced the competitive options of both ABS-CBN Telecom and Bayantel. Freed from the price and volume limits of the ISP, beginning in 1999, ABS-CBN Telecom and other U S . carriers were able to negotiate a variety of alternative arrangements with Bayantel, to the benefit of both U.S. and Philippine consumers.

---

[9] *ISP Reform* ***Order,*** 14 FCC Rcd at 7976-77. In so doing, the FCC outlined at least three ways "the ISP **may** act to inhibit competition": (1) by reducing incentives for U.S. carriers to negotiate lower settlement rates; (2) by distorting competition since proportional return forces U.S. inbound traftic flows for each carrier to be tied to outbound flows, **thus** penalizing smaller carriers that have a limited U S . outbound traffic base; and (3) by inhibiting retail competition since each carrier's settlement costs are known. ***Id.*** at 7972-73.

[10] ***See*** FCC Public Notice, "List of Foreign Telecommunications Carriers that Are Presumed to Possess Market Power in Foreign Telecommunications Markets," 14 FCC Rcd 7038 (I 999).

[11] *ISP* ***Reform Order,*** 14 FCC Rcd at 7985-88. The benchmark settlement rate for the Philippines was set at $.19 per minute, effective January 1,2000. ***See International Settlement Rates,*** IB Docket No. 96-261, ***Report and Order,*** 12 FCC Rcd 19806 (1997) ***("Benchmarks Order").*** **As** of that date, the FCC's accounting rate database ***(see*** **http://www.fcc.gov/ib/pdpi7acconnt.html)** showed that almost all Philippine carriers had settlement rates at or below **this** benchmark rate and the average net settlement rate for U.S. carriers on the Philippine route in 2001 was $.12 per minute. See 2001 International Telecommunications Data, ***supra,*** note **4.**

[12] In adopting the ***ISP Reform Order,*** 14 FCC Rcd at 7968-70, the Commission also reaffirmed the benefits of permitting ISR on U.S. international **routes** to WTO countries where at least 50% of the U.S. billed traffic is settled at or below the relevant benchmark. ISR arrangements, formally authorized in 1991, are not subject to the restrictions of the ISP and, where permitted, enable U.S. carriers to negotiate individual, asymmetric, non-proportionate agreements. ***See Regulation of International Accounting Rates,*** Phase II, CC Docket No. 90-337, ***First Report and Order,*** 7 FCC Rcd 559,561-62 (1991). The FCC added the Philippines to its list of ISR approved countries in 2000. ***See Public Notice,*** Rep. No. TEL-00304, 15 FCC Rcd 20205 (2000) (granting ISR authority on U.S.-Philippines route to Concert Global Network Services Limited).

In October 2002, the FCC initiated a new rulemaking proceeding to consider further reforms to its settlement rules.[13] For the first time, the agency sought comment on the circumstances that might warrant a reimposition of the ISP. The FCC asked, among other things, "whether a decision to re-impose the ISP or take action should be based on a case-by-case analysis or a presumption test."[14] The Commission also sought comment on whether a demonstration of "whipsawing" or other anti-competitive behavior sufficiently mandates the reinstatement of the ISP on a U.S.-international route on whether other public interest factors should also be weighed."" This Commission proceeding remains pending.

B. The AT&T and WorldCom Petitions

On February 7,2003, AT&T filed an "Emergency Petition" with the FCC alleging that, as of February 1, PLDT and five other Philippine carriers, including Bayantel, were "blocking AT&T traffic to the Philippines in support of an attempted 50 percent increase in termination rates" to $0.12 per minute.[16] AT&T asserted that the actions of the Philippine carriers "violate[d] the Commission's long-standing prohibition on whipsawing" and asked the Commission to "order all **U.S.** carriers to stop all settlement payments" to PLDT and the other named Philippine carriers (which included Bayantel) "until all [AT&T] circuits are restored."" AT&T requested that the stop payment order be imposed as "interim relief. . . pending final action . . . following any period of notice and comment that is applied.""

---

[13] ***International Settlement Policy Reform, International Settlement Rates,*** IB Docket No. 02-324, ***Notice of Proposed Rulemaking,*** 17 FCC Rcd 19954 (2002) ("***ISP Reform Notice"***).

[14] *Id.* at 19975.

[15] ***Id.***

[16] AT&T Petition at 1.

[17] ***Id.***

[18] ***Id.*** at 2. AT&T maintained that its request for prospective relief "fully satisfy[ies] the ***Virginia Petroleum Jobbers*** *Ass'n* ***v. FCC*** criteria under which the Commission evaluates requests for interim relief." ***Id.*** at 14 (footnotes omitted).

The bulk of AT&T's Petition is devoted to chronicling the alleged "whipsawing" activities of PLDT. However, AT&T also contended that the "other Philippine carriers have demanded the exact same rate increase effective on the same date" and that when PLDT "began blocking AT&T circuits on February 1,2003 . . . [o]ther Philippine carriers assisted PLDT by refusing to accept any AT&T traffic destined for PLDT's access lines."" As of February 7, AT&T asserted in particular that Bayantel was "blocking the large majority of traffic sent by AT&T."[20]

While acknowledging Bayantel's small base of local access lines, AT&T maintained that Bayantel had also engaged in whipsawing because Bayantel had "undertaken similar circuit disruptions as PLDT, at the same time as PLDT, in support of efforts to obtain the very same rate increase."" AT&T claimed that Bayantel, along with PLDT and other carriers had "signed agreements among themselves to charge these higher rates," citing the public disclosure of parallel domestic interconnection agreements with Globe Telecom, Inc. ("Globe").[22] AT&T

---

[19] *Id.* at 4-5.

[20] *Id.* at **5.** The sole support for the allegation regarding Bayantel **is** an affidavit by an AT&T executive which does not contain any factual evidence. Subsequently, on February 27,2003, AT&T alleged that "Bayantel which normally accounts for 3 percent of AT&T's traffic to the Philippines, continues to block the large majority of traffic." AT&T Reply at 5. To support this allegation, AT&T stated that the "ASR (Answer Seizure Rate) for AT&T's traffic to Bayantel, which is normally around 60 percent, has been at around 10 percent since February 6, 2003" based on a chart entitled "Blockage in the Philippines by Carrier." The chart purports to show the "ASR Number of Calls Completed vs. Circuits Seized" from January 26, 2003 to February 18,2003. The statistical methodology is not otherwise explained, however. Nor does AT&T define the traffic covered by the chart (whether "off-net'' **or** "on-net") or provide any data on the number of calls, by category, which were actually terminated by Bayantel. In any event, on March 25,2003, AT&T told the FCC that "Bayantel . . . appears to have ceased all blocking of traffic." ***See*** "AT&T Report on the Status of Its Efforts to Have Its Circuits Fully Restored on the U.S.-Philippines Route," IB Docket No. 03-38, dated Mar. 25,2003.

[21] AT&T Petition at 11.

[22] *Id.* On January 29,2003, Globe filed a Form 6-K with the U.S. Securities and Exchange Commission ("SEC") which disclosed that in January 2003 Globe had amended its interconnection agreements with, ***inferalia,*** PLDT and Bayantel, increasing the rates applicable from February 1, 2003 to traffic passing through an International Gateway Facility ("IGF") and terminating to a local exchange carrier network from $.08 to $.12; the rates for traffic passing through an IGF terminating to a Cellular Mobile Telecommunications System were increased from $.12 to $.16 per minute. Contrary to AT&T's Petition, however, the SEC filing does not show that Bayantel had agreed with Globe **(or** any other Philippine carrier) not to terminate international traffic on Bayantel's own network at a different rate.

further contended that, like PLDT, Bayantel had sent it a "similar notification . . . that AT&T's traffic would not be terminated unless AT&T paid the increased rates."[23]

On February 7,2003, WorldCom also filed a petition asking the FCC to prevent whipsawing on the U.S.-Philippines route. But, in contrast to AT&T's indiscriminate request for relief, WorldCom only asked the Commission to "order all U.S. carriers to suspend all payments to PLDT" **so** as to prevent PLDT "from continuing to abuse its market power" until "PLDT fully restores international service . . . ."[24] In its petition, WorldCom noted that although it had received requests for increased settlement rates from "all nine of its correspondents in the Philippines" since December 2002, "PLDT is the only Philippine carrier to block WorldCom's traffic.""

On February 10,2003, the FCC issued a Public Notice stating that AT&T and WorldCom had filed petitions requesting the FCC to protect U.S. consumers from "alleged 'whipsawing' behavior occurring on the US.-Philippines route."[26] The Notice described the specific relief AT&T and WorldCom had sought — namely, a stop payment order until service is fully restored — and also noted the carriers' request for interim relief. An expedited 10-day period was provided for comments on the "matters in this public notice" with replies due seven days later. The Notice did not seek comment on whether the public interest warranted relief other than that

In addition, the IGF traffic rates referenced in the new interconnection agreements are not country-specific.

[23] *Id.* at **4.**

[24] ***WorldCom Petition*** at 1.

[25] *Id.* at ***2.***

[26] ***Public Notice,*** "Petition For Protection From Whipsawing On The U.S.-Philippines Route," DA 03-390, released Feb. 10,2003. WorldCom later told the Bureau that "Bayantel [has] never blocked WorldCom traffic." Letter from Scott A. Stefferman, Associate Counsel, WorldCom, to Marlene H. Dortch, Secretary, FCC, IB Docket No. 03-38, dated Mar. 25,2003. ***See also Public Notice,*** DA 03-1030, released Mar. 31, 2003, ¶ 2.

requested by AT&T and WorldCom such as the reimposition of ISP-based uniform settlement terms between U.S. and Philippine carriers.

C. The Response of ABS-CBN Telecom and Bayantel

ABS-CBN Telecom filed a timely response to the FCC's Notice on February 27, 2003,[27] as did Bayantel.[28] The carriers urged the agency not to grant the relief requested by AT&T and WorldCom because an across-the-board stop payment order would unfairly hurt small carriers. In addition, ABS-CBN Telecom said Bayantel should be exempt from any FCC stop payment order because, with less than 8% of local access lines and no mobile subscribers, Bayantel lacked the market power to engage in whipsawing and had not, in any event, blocked the "large majority" of AT&T's traffic.

ABS-CBN Telecom explained that the price terms of the International Telecommunications Service Agreement ("ITSA") between Bayantel and AT&T had expired on December 31,2002. However, despite the risk of nonpayment,[29] in January 1,2003 Bayantel accepted approximately 2 million minutes of AT&T inbound traffic and during the first two weeks of February, and Bayantel terminated a comparable volume of traffic, declining only a small percentage (under 20%) destined for dialing codes not generally served by Bayantel's network.[30] The ITSA does not require the unconditional termination of non-Bayantel (i.e., off-

[27] ***See*** ABS-CBN Telecom Reply Comments, Feh. 27,2003.

[28] ***See*** Bayantel, "Position Paper Regarding AT&T's Emergency Petition For Settlement Stop Payment Order and Request for Immediate Interim Relief," Feh. 26,2003.

[29] The Bayantel-ITSA provides that if the parties have not agreed upon prices, "settlement shall he deferred until the new rates are agreed upon."

[30] These facts were documented in an affidavit provided by the Head of International Business for Bayantel. ***See*** ABS-CBN Telecom Reply Comments, Exhibit 1. On the same day **as** the filing, AT&T **also** filed its Reply pleading, again alleging that Bayantel "continues to block the large majority of **traffic."** AT&T Petition at ***5***. But, as noted, the ASR data submitted by AT&T to support this allegation are not dispositive because the methodology is unexplained and there is no data on the number of calls, **by** category, which were actually terminated by Bayantel. In and of itself, therefore, the ASR data does not support AT&T's claim in the face of the actual call volume data provided **by** Bayantel for the same period.

net) traffic, and Bayantel had previously advised AT&T and other U.S. correspondents that it reserved the right to limit any transit services provided for such calls.

ABS-CBN Telecom also denied AT&T's claim that Bayantel had engaged in threats of "whipsawing" by attaching relevant correspondence during January 2003.[31] The correspondence does not support the contention that Bayantel informed AT&T that it would not terminate AT&T's traffic on its network after February 1,2003 unless AT&T agreed to pay increased rates.

In addition, ABS-CBN Telecom rebutted AT&T's claim that Bayantel had acted in concert or colluded with other Philippine carriers to "whipsaw" U.S. carriers by entering into domestic interconnection agreements with Globe that were similar to those concluded by other Philippine international carriers. Philippine law requires domestic camers to offer equivalent, non-discriminatory interconnection terms to other carriers, and the Bayantel-Globe agreement did not address the terns on which Bayantel must settle inbound traffic from AT&T or other U.S. international carriers. The agreement limited itself to domestic access charges applicable to international (and domestic) traffic passed off to Globe.

On March 4,2003, counsel for ABS-CBN Telecom provided additional data to the International Bureau to document the carrier's limited (<2%) market share on the U.S.-Philippines route and the competitive status of its affiliate, Bayantel, which serves but **1%** of the more than 19 million wireline and mobile subscribers in the Philippines.[32]

---

[31] ***See*** ABS-CBN Telecom Reply, Attachments A-E (filed with the Commission in confidence).

[32] ***See*** Letter of Gregory C. Staple, Counsel, ABS-CBN Telecom, to Ms. Marlene H. Dortch, Secretary, FCC, dated March ***5*, 2003.** **A** copy of the statistical data which was appended to that letter is attached hereto as Exhibit 1.

D. The *ZB Order*

Only one week after the abbreviated comment period had run, the Bureau released a 21-page order directing "all U.S. carriers" with authority to provide facilities-based international switched voice services on the U.S.-Philippines route "to suspend immediately all payments for termination services'' to PLDT, Bayantel and the four other non-dominant Philippine carriers identified in AT&T's petition.[33] Four other non-dominant Philippine international carriers not cited in AT&T's Petition were not covered by the ***IB Order,*** however.[34] The Bureau directed AT&T to notify it upon full restoration of service and stated that it would issue a public notice "upon resolution of the situation that will lift the suspension that we now impose."[35] As discussed further below, though, on March 31,2003, the FCC lifted the suspension of U.S. carrier payments to Digital Telecommunications Philippines, Inc. ("Digitel") and Bayantel.[36]

In addition to granting the stop payment relief that AT&T had sought and which had been noticed for comment on February 10, the Bureau also acted, without notice, to re-regulate all settlement payments on the U.S.-Philippines route. It did so notwithstanding the fact that, since 1999, the FCC's rules had authorized U.S. international carriers to enter into settlement agreements with any non-dominant carrier, such as Bayantel, without regard to the ISP. More specifically, the Bureau stated that because "'whipsawing' has occurred on the U.S.-Philippines route," it was removing the Philippines from the list of routes approved for ISR.[37] Once the suspension of payments order is lifted, said the Bureau, "U.S. carriers shall make payments for

[33] *IB* ***Order*** ¶ 1.

[34] ***See id.*** **721** n.94. These carriers are: Capitol Wireless Telecommunications (CapWire); Eastern Telecommunications Philippines, Inc. (ETPI), Philippine Global Communications (PhilCom), and Isla Communications Competition (IslaCom). ***See,*** *e.g.,* the FCC's list of Philippine carriers having accounting rate agreements with U.S. carriers at **http://www.fcc.gov/ib/pdpF/attweb.xls**

[35] *Id.* ¶ 1.

"***Public Notice,*** **DA 03-1030,** released Mar. **31,2003.**

[37] *IB* ***Order*** ¶ **19.**

traffic settled only pursuant to the ISP for the time period effective from February 1,2003 until the date the Bureau returns the Philippines to the ISR-approved list."[38]

The Bureau said that it was reimposing the ISP to prevent discrimination among U.S. carriers and to ensure the filing of accounting rates so as to monitor compliance with the ISP."[39] The Bureau also noted that the ISP required U.S. carriers to "divide the accounting rate evenly with Philippine carriers, to negotiate proportionate return of traffic and to ensure nondiscrimination among U.S. carriers" in addition to the general requirements of complying with the "No Special Concessions" rule.[40]

In addition, the Bureau stated that market-wide application of the ISP would assist it in monitoring the potential of "price squeeze" behavior by U.S. carriers' foreign affiliates.[41] The Bureau said that a "price squeeze" involves "the ability of foreign carriers with market power" to distort U.S. competition by maintaining monopoly pricing for foreign termination services while its U.S. affiliate under prices competing U.S. carriers in the retail market.[42] The Bureau noted that AT&T had raised concerns about potential price squeeze behavior between PLDT, a

---

[38] ***Id.*** The Bureau stated that it "will reinstate the Philippines to the **[ISR** approved] list sixty days after the last ISP-compliant accounting rate agreement between U.S. and Philippine carriers has been granted, bamng any further evidence of anticompetitive behavior." ***Id.*** Under the ISP, U.S. carriers must submit their accounting rate agreements and any modifications thereto for FCC review. Accounting rate modifications are subject to public notice and are deemed to be granted on the 22nd day without any formal staff action, provided there has been no objection and the Bureau has not acted to suspend the modification. 47 C.F.R. § 64.1001(g).

[39] *IB **Order*** ¶ 20.

[40] ***Id,*** The "No Special Concessions" rule prohibits U.S. international carriers "from agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market and from agreeing to accept special concessions in the future." **47** C.F.R. § 63.14(a). **"A** special concession is defined as an exclusive arrangement involving services, facilities, or functions on the foreign end of a US. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S.-licensed camers, ..." 47 C.F.R. § 63.14(b).

[41] ***IB Order*** ¶ 20.

[42] ***Id.*** ¶ 20 n.93.

dominant carrier, and its affiliate and that other Philippine carriers, such as Bayantel, had U.S. affiliates.[43]

Without even acknowledging the Commission's existing rule-based ISP exemption for U.S. carrier agreements with non-dominant Philippine carriers, the Bureau states that the ISP would apply to U.S. carrier negotiations with Bayantel too. According to the Bureau, this was justified because Bayantel and other non-dominant carriers had been engaged in "whipsawing" and "these carriers in conjunction with PLDT possess control over a substantial majority of the termination services in the Philippines."[44]

Despite the prior request for comments on the AT&T and WorldCom petitions, the *IB **Order*** does not mention (let alone address) any of the factual or legal points raised by ABS-CBN Telecom or Bayantel. The sole reference to these parties' filings is made in a footnote to the background section of the ***IB Order*** which provides an alphabetical listing of Reply Comments. Thus, despite the contrary factual evidence filed by ABS-CBN Telecom, the *IB **Order*** only cites to and discusses AT&T's whipsawing allegations regarding Bayantel and ignores the rebuttal evidence which was also before it. *The IB **Order*** also makes no mention of ABS-CBN Telecom's request to exempt small **U.S.** carriers from any remedial order.

E. Subsequent Events

In response to the Bureau's unprecedented action, on March 12,2003, the Philippine National Telecommunications Commission ("NTC") issued an order directing Bayantel and the

---

[43] ***Id.*** But AT&T never alleged that Bayantel or ABS-CBN Telecom had tried to engage in a price squeeze or had the ability *to* do so. The Commission itself **had** previously found that AT&T's concerns regarding price squeezes by the U.S. affiliates of non-dominant foreign camers are baseless. ***See International Settlement Rates,*** IB Docket No. 96-261, ***Report and Order on Reconsideration and Order Lifting Stay,*** 14 FCC Rcd 9256,9270 (1999).

[44] ***IB Order*** ¶ 21.

other affected carriers "[n]ot to accept terminating traffic via direct circuits from U.S. facilities-based carriers who do not pay Philippine carriers for services rendered."'

On March 31,2003, the FCC issued a Public Notice stating that, based on the March 25 reports filed by AT&T and WorldCom indicating that neither Bayantel nor Digitel were continuing to block U.S. carrier traffic, the suspension of settlement payments required by the ***IB Order*** would be lifted for U.S. carrier payments to these two Philippine carriers.[46] However, "U.S. carriers must comply with other provisions of the Order with respect to Digitel and Bayantel,"[47] including the negotiation of ISP-based arrangements retroactive to February 1, 2003.

III. The *IB Order* Is Arbitrary and Capricious Because Bayantel Did Not Whipsaw AT&T and Thus Was Improperly Included In the Order

The legal predicate for the remedial provisions of the ***IB Order*** is "whipsawing," but, at least so far as Bayantel is concerned, no whipsawing occurred. Consequently, the remedies adopted by the Bureau were inappropriate for U.S. carrier agreements with Bayantel.

To date, in every case where a whipsawing complaint has been upheld — whether for record or voice services — the foreign carrier involved was a monopoly or presumed to be dominant.[48] **As** the Commission itself has often stated, "'Whipsaw' is the term used to describe the ability of the foreign correspondent to utilize its *monopoly* power to play one carrier against

---

[45] ***Memorandum Order,*** National Telecommunications Commission, Republic of the Philippines, Mar. 12,2003, at 3.

[46] *See* ***Public Notice,*** **DA** 03-1030, released Mar. 31,2003.

[47] ***Id.***

[48] ***See, e.g., Mackay Radio and Telegraph*** Co., 2 FCC 592 (Telegraph Committee 1936), *aff'd* ***sub nom. Mackay Radio v.*** *FCC*, 97 F.2d 641 (D.C. Cir. 1938) (rejecting preferential U.S. carrier contract with monopoly Norwegian telegraph operator); ***AT&T Corp.,*** 11 FCC Rcd 18014 (1996) (finding whipsawing by Telintar, the monopoly provider of international telecommunications in Argentina). ***See also*** *IB* ***Order*** ¶¶ 1, 10 nn.1, 36 (citing several cases involving monopoly or dominant foreign carriers in Guyana, India and Mexico).

others to gain concessions and benefits from the U.S. international carriers."[49] It follows, therefore, that where a foreign carrier does not have a monopoly — which is undisputed in Bayantel's case — whipsawing cannot simply be presumed to arise during the course of U.S. carriers' interconnection negotiations with a foreign correspondent but must be carefully investigated on a case-by-case basis. Here, the Bureau found that whipsawing had occurred because a "group of carriers [was] acting in concert."[50] But, this finding was based almost exclusively on the allegations of AT&T and does not bear scrutiny.

Bayantel is one of the smallest international carriers in the Philippines, serving approximately 200,000 exchange lines which amounts to but 1% of the total base of fixed and mobile subscribers in the Philippines." Thus, as AT&T acknowledges in its Reply pleading, Bayantel generally terminates *just* 3% of AT&T's traffic to the Philippines, which in and of itself plainly provides no basis for whipsawing.[52] (Indeed, under established Commission policies no foreign carrier with less than a 50% share of the market for international or local exchange service has market power.[53])

---

[49] *Uniform* ***Settlement Rates on Parallel International Communications Routes,*** 84 FCC 2d 121, 122 n.3 (1980) (emphasis added). ***See also Policy Statement,*** 11 FCC Rcd at 3147 ("Our International Settlements Policy (ISP) supports competing **U.S.** carriers in their bilateral accounting rate negotiations with ***monopoly*** foreign carriers. . . . The ISP prevented foreign ***monopolies*** from using their market power to obtain discriminatory accounting rate concessions from competing U.S. carriers (***i.e.***, 'whipsawing').") (emphasis added).

[50] *IB Order* ¶ 10.

[51] The Philippines **has** over 19 million telephone subscribers, including at least **16** million mobile telephone lines which now account for the bulk of international telephone traffic. For additional data on carrier market shares, see Exhibit 1 hereto.

[52] ***See*** AT&T Reply at 5 n.8.

[53] ***See, e.g.***, ***Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,*** **IB** Docket Nos. 97-142 and 95-22 ***Report and Order on Reconsideration,*** **12** FCC Rcd 23891, 23869-99 (1997).

Nor did Bayantel obtain market power by acting in concert with other Philippine carriers.[54] The record evidence respecting Bayantel's alleged activities is purely circumstantial[55] and does not provide a valid legal basis for the Bureau's interference. More specifically:

- The Order states (at ¶ 12) that Bayantel also blocked a "substantial part" of AT&T's circuits, but ABS-CBN Telecom provided a sworn affidavit from Bayantel to the contrary. And AT&T later advised the Bureau that Bayantel had ceased blocking its traffic, although no unlawful blocking ever actually occurred.
- The Order states (at ¶ 17, n.81) that Bayantel acted in concert in demanding a uniform price increase and retaliating unless AT&T paid an increased settlement rate, but correspondence submitted to the Bureau showed that Bayantel did not threaten to block AT&T traffic destined for Bayantel if it did not pay increased settlement charges. Moreover, the settlement rate charges initially proposed by Bayantel were not identical to those of other carriers[56] and the effective date of the proposed changes for AT&T coincided with the dates proposed by other carriers only because, by mutual agreement with AT&T, the parties' prior settlement rates expired at the end of 2002.
- The Order also maintains (at ¶ 12) that Bayantel acted in concert because Bayantel entered into a domestic interconnection agreement with increased rates for transiting international traffic during the same month that Globe entered into like agreements with PLDT and other carriers. However, the Globe agreement does not mandate any particular settlement rate for the termination of AT&T's international traffic on Bayantel's network — it only covered domestic termination charges for other networks. Further, non-discriminatory domestic interconnection agreements (*i.e.*, parallel agreements between Philippine domestic carriers) are required by local regulation.

---

[54] According to the Bureau, "[t]he record suggests that the five other Philippine camers named in the AT&T Petition have engaged in concerted actions, along with PLDT, to 'whipsaw' U.S. carriers. . . ." *IB Order* ¶ 12.

[55] *See, e.g.*, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (conduct that is consistent with permissible competition as with unlawful conspiracy does not, standing alone, support an antitrust claim); *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37 (7th Cir. 1992) (rejecting collusive price fixing based on circumstantial evidence in an interdependent industry where parallel pricing may be expected).

[56] *See* ABS-CBN Telecom Reply, Exhibit 1.

- Finally, the Order (at ¶ 21) states that Bayantel and five other named Philippine carriers "possess control over a substantial majority of termination services in the Philippines." But, again, this fact alone does not mean that any single carrier, such as Bayantel, has engaged in whipsawing. In any event, on the same facts, the Bureau could equally have said that a substantial minority of termination services are not controlled by the dominant carrier, a prime indicator that whipsawing is impossible. "Traditionally, in order for foreign carriers to engage in 'whipsawing' behavior effectively. . . there must be no available, alternative means of terminating U.S.-originated traffic in the foreign market."[57] The IB *Order* (at ¶ 21 n.94) also excludes the termination services of four Philippine international carriers not named by AT&T (i.e., Capitol, IslaCom, ETPI and PhilCom).

In sum, Bayantel itself lacks market power and there is no credible evidence showing that Bayantel gained a dominant position vis-à-vis AT&T (or any other U.S. carrier) by acting in concert with PLDT (or others).

The courts and the Commission have consistently warned against the adoption of a "one-size-fits-all" approach to agency policies that does not take account of relevant factual differences among regulated parties or are not sufficiently granular in analyzing specific market conditions. Most recently, in ***USTA v. FCC***[58] the D.C. Circuit vacated the FCC's standards for determining the scope of unbundled network elements that must be offered to competing carriers by incumbents under the local competition provisions of the Communications Act. It did so because the standards were made uniformly applicable in every geographic or customer market without analysis of the competitive network alternatives in any particular market. The court thus held that the FCC had not met its implicit statutory obligation to conduct a sufficiently granular

[57] ***ISP Reform Order,*** 14 FCC Rcd at 7977-78

[58] 290 F.3d 415 (D.C. Cir. 2002).

analysis of the marketplace to determine whether competition would really be impaired if a given element were not unbundled.[59]

Similarly, in ***Petroleum Communications, Znc.*** *v. FCC*,[60] the D.C. Circuit stated:

> "We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently.. . But the converse is also true: An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties."[61]

The failure of the Bureau to do just that with regard to Bayantel rendered the remedial portions of its decision arbitrarily overbroad.

IV. The Bureau's Order Is Also Arbitrarv and Capricious Because it Whollv Ignored ABS-CBN Telecom's Waiver Reauest.

The Bureau's failure adequately to consider the critical marketplace distinctions between the carriers potentially covered by any proposed order is also reflected in the Bureau's complete failure to address the waiver request of ABS-CBN Telecom. The courts have long held that the FCC must consider the grounds for waiving the application of a general rule or policy when they are fairly raised by a party and may not dismiss them out of hand or shut its eyes to a party's request.[62] Yet, that is what the Bureau did here.

The grant of a waiver is appropriate if: (1) special circumstances warrant a deviation from the general rule; and *(2)* a deviation would not disserve the rule's underlying purpose and would

---

[59] On remand, the Commission apparently was careful to heed the court's admonition. ***See,*** *e.g.*, FCC News, "Commissioner Kevin J. **Martin's** Press Statement on the Triennial Review," released Feb. 20, 2002, at 2.

[60] 22 F.3d 1164 (D.C. Cir. 1994).

[61] ***Id.*** at 1172. ***See also Leather Industries of America, Inc. v. EPA,*** 40 F.3d 392 (D.C. Cir. 1994) (remanding an EPA regulation because the agency did not account for differences in the types of effluent being regulated; on remand, the court directed the agency to consider appropriate data in the record and set regulations accordingly).

[62] *See, **e.g., BellSouth Corp.*** v. ***FCC***, 162 F.3d 1215, 1224 (D.C. Cir. 1999) ("[W]hen an agency receives a request for waiver that is 'stated with clarity and accompanied by supporting **data,'** such requests 'are not subject to perfunctory treatment, but must be given a bard **look."')** (quoting *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)); ***Morris Communications Inc. v. FCC,*** D.C. Cir No. 01-1 123, Slip Op. released April 17, 2002 (remanding order denying Application for Review because FCC failed to consider waiver argument).

better serve the public interest than would strict enforcement.[63] The timely filed Reply Comments of ABS-CBN Telecom met this standard.

First, the U.S. market position of ABS-CBN Telecom is unique. Though it handles only approximately 1% of U.S. switched traffic on the Philippine route, that traffic accounts for over 90% of its revenues. ABS-CBN Telecom therefore stood to be disproportionately harmed by any stop payment because, absent the ability to compensate its Philippine correspondents, it might be unable to terminate traffic and be forced to suspend public service, causing it serious financial hardship. ABS-CBN Telecom is also special because it is one of a few Filipino-oriented carriers offering enhanced customer service, including bilingual calling cards and bilingual assistance via its U.S.-based staff.

Second, good cause exists for granting a waiver because exempting ABS-CBN Telecom (and other carriers with ***de minimis*** traffic ***on*** the Philippine route) would be likely to promote rather than reduce competition and hence better serve the underlying purpose of the ISP. ABS-CBN Telecom sends all of its U.S. traffic to non-dominant Philippine carriers. Any traffic that it might continue to terminate would consequently tend to strengthen the position of competing carriers at the foreign end. In addition, if a stop payment order sharply curtailed ABS-CBN Telecom business its customer base would likely be ceded to larger carriers, again reducing competition.

On *the* other hand, exempting ABS-CBN Telecom from a stop payment order would not materially impair the relief granted major **U.S.** carriers. ABS-CBN Telecom's ***de minimis*** share of outbound U.S. traffic generates a ***de minimis*** amount of additional settlement payments **as**

---

[63] ***See Northeast Cellular** Tel. Co. **v.** FCC,* 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio*, 418 F.2d **at** 1157 (D.C. Cir. 1969).

compared to AT&T and WorldCom. Hence, the addition of the ABS-CBN Telecom funds to any pool of suspended payments would be unlikely to have a material impact on the negotiating position **of** any major U.S. carrier. Further, because ABS-CBN Telecom's settlements flow to competitive carriers in the Philippines, an industry-wide stop payment order would actually apply less pressure on any dominant carrier in the Philippines than an order which exempts ABS-CBN Telecom.[64]

For similar reasons, competition would be disserved by voiding ABS-CBN Telecom's correspondent agreements post-February 1 and replacing them with ISP-based terms. ABS-CBN Telecom and Bayantel do not have market power and hence have no ability to engage in a price squeeze.[65] Major U.S. carriers also would not be harmed by exempting ABS-CBN Telecom from the ISP **rules** either because the carrier has such a small traffic base.

Based on the foregoing, good cause plainly existed for the Bureau to grant ABS-CBN Telecom's waiver request. The Bureau's complete failure to acknowledge, much less consider, the request is reversible error and should be cured forthwith by the Commission.[66]

---

[64] The *IB **Order*** implicitly acknowledges that **an** industry-wide remedy was not essential to its objectives by permitting U.S. carriers to continue making settlement payments to four non-dominant Philippine carriers not specifically named in AT&T's Petition. ***See** IB Order* ¶ 21 n.94. In view of this exemption, the Bureau's failure to exempt ABS-CBN Telecom and other small U.S. carriers from its order was particularly capricious.

[65] ***See also*** note 44.

[66] ***See*** 47 C.F.R. § **1.3** ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

V. The Bureau's Decision To Nullify the Existing Philippine Settlement Agreements of All U.S. Carriers and to Reimpose the ISP Was Procedurally Flawed, Impractical and Contrary to Commission Precedent.

A. The Bureau Was Obligated to Give U.S. Carriers Adequate Notice and an Opportunity to Comment Before Nullifying Existing Settlement Agreements with Philippine Carriers.

The remedial provisions of the *IB Order* have the practical effect of retroactively abrogating, as of February **1,2003,** the core provisions of operating agreements that ABS-CBN Telecom and other **U.S.** carriers have with their Philippine correspondents. In place of the existing agreement, the ***ZB Order*** directs U.S. carriers to negotiate new terms and conditions that comply with the ISP — i.e., terms that provide for a 50/50 division of rates, that require proportionate return of U.S. outbound traffic (though no current marketwide data exists to calculate this — see Part V.C below), and that are not discriminatory among **U.S.** carriers. Given the unprecedented nature of this remedy — to date, neither the Bureau nor the Commission have ever reimposed the ISP on contracts with any competitive foreign carrier[67] — and that the Commission itself has only recently sought public comment on the standard for taking such action, the Bureau had a clear obligation to give potentially affected parties prior notice and a fair opportunity to comment.[68]

It bears emphasis that neither the AT&T nor WorldCom petitions asked the Bureau to reimpose the ISP on their Philippine interconnection contracts. Nor did the FCC's Public Notice seek comment on this issue, though the Bureau clearly could have done so if it was contemplating such an extraordinary measure. The Bureau's failure to give adequate notice was particularly inexcusable given the open rulemaking proceeding (IB Docket No. **02-234)** on the

---

[67] Prior cases cited in the *IB* ***Order*** involved only orders to stop payment, not reimpositions on the ISP. ***See,*** *e.g.*, ¶¶ 1, 10, notes 1 and **36.** No cases are cited by the Bureau in support of its decision at ¶20 to reimpose the ISP.

[68] ***See* 5** U.S.C. § 553.

very same matter because, absent a decision in that docket, it was reasonable for potentially affected parties to rely upon the status quo ante (i.e., the rules adopted in the *ISP Reform Order*).

Nor can the lack of notice be justified on the ground that the Bureau was granting injunctive relief or exercising its enforcement powers under Title II of the Communications Act. Under Section 205 of the Communications Act,[69] the FCC may only prescribe just and reasonable charges, practices or regulations "after full opportunity for hearing." There was no hearing here, of course. Similarly, the FCC's formal complaint rules also ensure that affected parties are given due notice of the relief sought by virtue of the detailed pleading requirements imposed on complainants.[70] Even where the ISP is involved, therefore, there is no precedent for the Bureau to completely side-step these procedural safeguards under the mantle of "enforcement."[71]

B. The Blanket Reimposition of the ISP Was Also Unlawful Because it Violated The FCC's Existing Competition Policies and Rules for International Services.

As discussed above, in 1999, after developing an extensive record, the FCC exempted U.S. carriers from adhering to the ISP in their operating agreements with Bayantel and other non-dominant foreign carriers (i.e., any carrier having a market share of less than 50%). The Commission did so in recognition that the ISP "is not only unnecessary, but could impede competition among U.S. carriers . . . when it is applied to U.S. carriers and foreign carriers that

[69] 47 U.S.C. § 205.

[70] *See* 47 *C.F.R.* §§ 1.720-1.736.

[71] The Bureau also said that it was taking "final action" rather than granting injunctive relief, which might have justified more truncated procedures. But, as demonstrated in ABS-CBN Telecom's Reply Comments (at 3 n.5), the petitioners did not even meet the applicable standard for injunctive relief — a fact the Bureau also sought to avoid by characterizing its action as "final."

lack market power."[72] In other words, where competitive carriers are involved, the ISP does more harm than good.

The *IB* ***Order*** does not rebut this finding. It contains but a single short paragraph regarding the reimposition of the ISP for contracts with Bayantel and the four other Philippine carriers considered non-dominant. The paragraph omits any mention of the ***ISP Reform Order*** or the rule changes it adopted. It also completely overlooks the outstanding Commission rulemaking proceeding in which the agency asked for guidance on whether whipsawing alone or other public interest factors should be determinative in reimposing the ISP,[73] and whether the ISP should be removed altogether for certain routes (regardless of whether a carrier on that route has market power) if, as with the Philippines, the settlement rates are benchmark compliant.[74] These oversights, which could also have been avoided,[75] led the Bureau to adopt an unnecessarily broad order directly at odds with the FCC's existing commitment to liberalize contract terms between U.S. and competitive overseas carriers.[76]

The only explanation the ***IB Order*** gives for reimposing the ISP on Bayantel (and other non-dominant carriers) is the prior finding that these carriers have engaged in "whipsawing."[77] But, as shown above, Bayantel did not engage in whipsawing and, even assuming ***arguendo*** it had, given the FCC's prior rule-based ISP exemption for U.S. carrier contracts with Bayantel, such a finding did not provide a legal basis for automatically reimposing the ISP. Any

---

[72] *ISP Reform* ***Order,*** 14 FCC Rcd at 7972 (footnote omitted). ***See also supra*** note 11 and accompanying text.

[73] ***See*** *ISP Reform* ***Notice,*** 17 FCC Rcd at 19975.

[74] *See* ***id.*** at 19973.

[75] The *IB* ***Order*** acknowledged the *ISP Reform* ***Order*** and the pending rulemaking inquiry in **IB** Docket No. 03-324, *et al.*, but inexplicably ignores their relevance to the remedial provisions of the Order. ***See*** *IB* ***Order*** ¶¶ 10, 12.

[76] *See Motor Vehicle Mfrs. Ass'n v. State Farm* ***Mu!.*** *Auto.* ***Ins. Co.,*** 463 **U.S.** 29 (1983) (remanding a decision to rescind a requirement that cars include passive restraints because of the agency's failure to justify that rescission in light of prior agency findings).

[77] *Id.* ¶ 19.

reimposition required a full explanation of the relevant costs and benefits akin to that conducted by the FCC in 1999 when it repealed the ISP rule, as the FCC acknowledged last year when it again asked for comment on the very issue. Ignoring all this, the Bureau simply took matters into its own hands, but it did so unlawfully.

Because the Commission's rules provided an express exemption from the ISP for U.S. carrier contracts with non-dominant Philippine carriers such as Bayantel, the Bureau was, at a minimum, obliged to explain why repeal of that exemption was warranted taking into account all the facts before it, including the fact that the proposed new settlement rates (generally $.12 per minute) were below the applicable benchmark. The Commission has never decided whether whipsawing on a competitive route by a non-dominant carrier, allegedly to obtain a sub-benchmark rate, even if proven, should require reimposition of the ISP. Thus, given the acknowledged harms that the **ISP** brings with it,[78] any such re-regulation must be considered as a last resort — not one to be pursued from the "get go," but only after any other remedy (e.g., stop payment) had time to be tested and evaluated. The Bureau's failure to respect the Commission's prior ISP reform rules **or** to provide a reasonable explanation for departing therefrom provides further ground for reversal.[79]

---

[78] ***See supra*** note 9. Small U.S. carriers are particularly disfavored by the **ISP's** proportional return requirements because the limited volume of return traffic to which they are entitled and the uncertain future size of the stream may make it difficult to justify the costs of acquiring the necessary international return circuits. The cost of providing return circuits may also discourage new correspondent agreements with small Philippine camers.

[79] After the Bureau had removed Bayantel from the stop-payment provision of its order on March **3** 1,2003, the Bureau's continued insistence on the reimposition of the ISP rules became even more arbitrary and capricious given that the predicate for the Bureau's remedial action, namely whipsawing, was negated by its simultaneous finding on March **31** that Bayantel had ceased to block any **U.S.** carrier's traffic. Still, in announcing the March **3** 1 action, the Bureau failed to provide any explanation as to why the application of the ISP continued to be necessary.

C. The *IB Order* Was Also Arbitrary Because, After Years of Deregulation, it Is Not Practical for U.S. Carriers to Re-Establish ISP-Based Settlement Agreements.

The hasty and irrational nature of the Bureau's decision to reimpose the ISP on the majority of US.-Philippine settlement agreements is also demonstrated by the Bureau's disregard for the practical details. The ***IB Order*** provides no discussion or guidance whatsoever on how the ISP can be implemented on routes where carrier contracts have been liberalized since the late 1990s and millions of minutes of traffic course back and forth daily between tens of carriers. The fact is that no U.S. carrier currently has adequate information to put the competitive genie back into the ISP's uniform box – there simply is too much traffic routed by too many different carriers under too many different terns.

For example, the ISP requires the proportionate return of inbound U.S. traffic to each U.S. carrier based on the total volume of U.S. outbound traffic to the Philippines. The FCC's rules also require any **U.S.** carrier filing a modified operating agreement (as the *IB* ***Order*** requires, see ¶30) to certify that it has not bargained for nor has any indication that it will receive more than its proportionate share of traffic.[80] However, there is currently no independently verified public data on the volume of outbound U.S. traffic, carrier by carrier, that U.S. and Philippine carriers can use to implement their proportional return obligations. Nor can a fair and accurate database be readily compiled given the variety of settlement arrangements and the lack of a standard agreement on the scope of traffic that should be included (notably, ISR traffic).[81]

---

[80] 47 C.F.R. § 64.1000(d)(2).

[81] The outdated statistics for 2001 in the FCC's 2001 International Telecommunications Data report ***(supra*** note 5) highlight some of the problems involved in calculating outbound market shares for each U.S. carrier. The report discloses (at **30)** that several major carriers (BellSouth, AT&T Wireless, Teleglobe) filed data in confidence and hence their market shares are **unknown;** as importantly, approximately 60% of U.S. billed traffic was routed to the Philippines via **ISR** facilities, often via third countries (see Table A3a) and hence, when ISR facilities are no longer permitted, the attribution of this traffic to the "old" ISR carriers would unfairly favor this group of carriers vis-a-vis

Historic disagreements amongst U.S. and Philippine carriers on issues like these made a fair administration **of** the ISP problematic even when most U.S. carriers supported it.[82]

With at least seventeen U.S. and six Philippine carriers subject to the *IB* ***Order,*** it is also impractical for any carrier to determine in advance whether any specific set of terms and conditions are ISP-compliant. As a result, even if valid proportional return ratios can be established, which is very doubtful, the *IB* ***Order*** will require multiple rounds of Section 64.1001 modification requests, Public Notices, carrier comments, Bureau decisions (accepting or rejecting each of more than 100 modified contracts), followed by further contract negotiations, modification requests, etc. – all in a quixotic attempt to reimpose the ISP for a scant 60 days until alternative settlement arrangements are again permitted.

VI. Conclusion

For all of the above reasons, the Commission should vacate the *IB* ***Order*** **or,** at a minimum, amend it by: (1) deleting Bayantel from the list of covered Philippine carriers; and (2) exempting ABS-CBN Telecom from the remedial provisions.

Respectfully submitted,

ABS-CBN TELECOM
NORTH AMERICA, INC.
By: Gregory C. Staple
Gregory C. Staple
R. Edward Price
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, N.W.
Washington, DC 200004-1008
(202) 639-6500

BAYAN TELECOMMUNICATIONS, INC.
By: S.A.Supelana/rs
Sherry Ann Supelana
Vice President, International Business
2F Bayantel Corporate Center
Maginhawa corner Malingap Streets
Teachers' Village, Diliman, Quezon City
Philippines
+63-2-449-2597

April 9, 2003

---

others.

[82] However, the fewer U.S. and Philippine carriers covered by the **ISP,** the more manageable it may be for the Bureau to calculate proportional return ratios and re-establish uniform settlement terms.

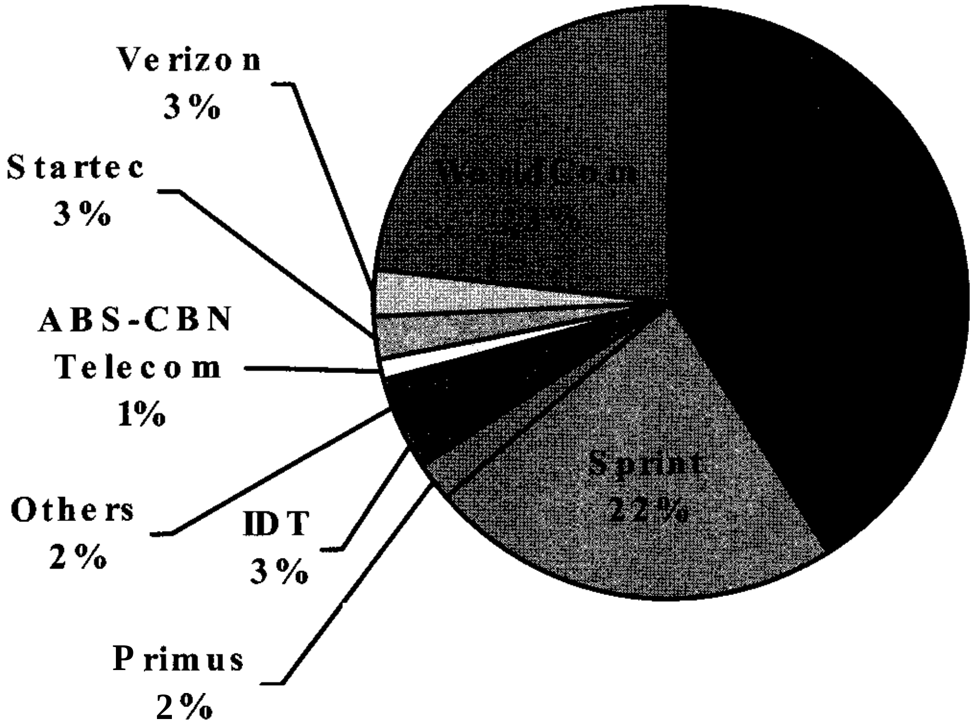
Exhibit 1:

ABS-CBN Telecom North America, Inc.

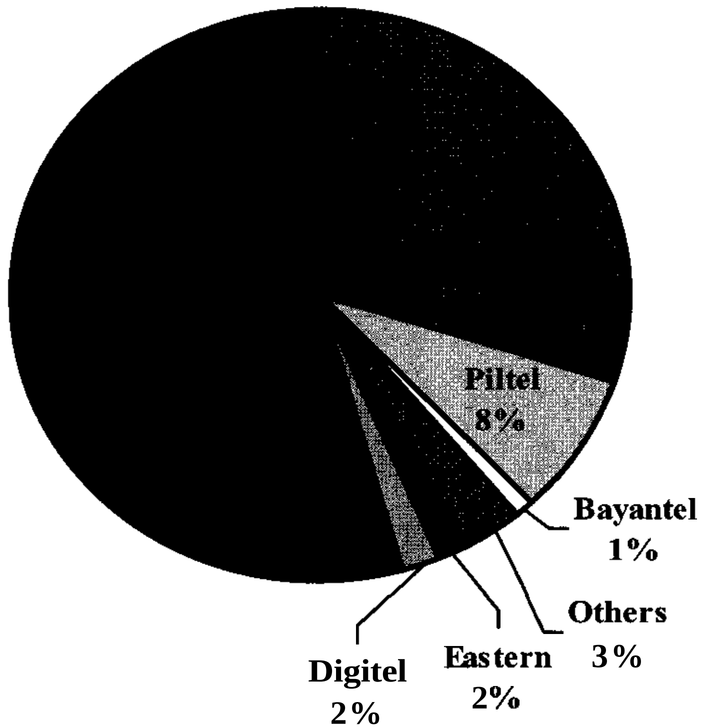
March **4,2003** ***Ex Parte***

Market Shares of U.S. and Philippine Carriers

U.S. Carriers[1]



Philippine Carriers[2]



Based on 2001 **U.S.** billed international switched telecommunications traffic.
Based on 2001 wireline and 2002 mobile subscribers.

***Prepared** by Vinson **& Elkins** LLP, **March 4,** 2003*

Access Lines / Subscribers for
Selected Philippine Couriers

Carrier	Services	Subscribed Lines (x106)	Mobile Subscribers (x106)	Total %
PLDT	Wireline/IGF	2 1	–	10 4
Smart	Mobile/IGF	–	8.9	44.1
Globe	Wireline/Mobile/IGF	.15	6.0	30.0
Piltel	Wireline/Mobile/IGF	.08	1.5	7.8
Digitel	Wireline/IGF	.39	–	2.0
Islacom	Wireline/Mobile/IGF	.07	.23	1.5
Extelcom	Mobile	–	.25	1.3
Bayantel	Wireline/IGF	.21	–	1.0
Philcom	Wireline/IGF	.05	–	<1
Other		.26	–	2.0
Total		3.31	16.9	100.0

Notes: PLDT is the controlling shareholder of Smart. Bayantel and Digitel have mobile licenses but were not operational in 2002.

Sources: Company reports and National Telecommunications Commission (NTC). Fixed line data as of 12/31/01. Mobile subscribers as of 9/30/02; some carriers estimated.

U.S. Billed Traffic to
the Philippines 2001

Carrier	Minutes (x 10^6)	Percent
AT&T	519	31.2
WorldCom	386	23.2
Sprint	377	22.7
PLDT	173	10.4
Startee	44	2.6
Verizon	44	2.6
Primus	35	2.1
JDT	34	2.0
ABS CBN Telecom	18	1.1
Telecom Italia	17	1.1
C&W	12	.7
Other	5	.3
	1664	100

Source: 2001 International Telecommunications Data, Industry Analysis & Technology Division, FCC.

Prepared by Vinson **& Elkins L.L.P.,March 4,2003**

CERTIFICATE OF SERVICE

The undersigned, an employee of Vinson & Elkins L.L.P., hereby certifies that the foregoing document was mailed on April 9,2003 by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

*The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*The Honorable Michael Copps
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*The Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*R. Paul Margie
Legal Advisor
Office of Commissioner Michael Copps
Federal Communications Commission
445 – 12th Street, SW, Room 8-A302
Washington, D.C. 20554

*Bryan Tramont
Senior Legal Advisor
Office of Chairman Michael K. Powell
Federal Communications Commission
445 – 12th Street, SW, Room 8-B201
Washington, D.C. 20554

*Samuel L. Feder
Legal Advisor
Federal Communications Commission
Office of Commissioner Kevin Martin
445 – 12th Street, SW, Room 8-A204
Washington, D.C. 20554

*The Honorable Kathleen Q. Ahernathy
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*The Honorable Kevin Martin
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Jennifer Manner
Legal Advisor
Office of Commissioner Kathleen Abemathy
Federal Communications Commission
445 – 12th Street, SW, Room 8-B115
Washington, D.C. 20554

*Barry Ohlson, Interim
Legal Advisor
Office of Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 – 12th Street, SW, Room 8-C302
Washington, D.C. 20554

*Donald Abelson, Chief
International Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 6-C750
Washington, D.C. 20554

*Kathy O'Brien
International Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

*Jackie Ruff
International Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

*Jim Ball
International Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

*Lisa Choi
International Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

*Robert M. Pepper, Chief
Office of Plans & Policy
Federal Communications Commission
445 – 12th St., S.W., Room 7-C347
Washington, D.C. 20554

*J. Breck Blalock
Deputy Chief, Policy Division
International Bureau
Federal Communications Commission
445 – 12th St., S.W., Room 6-A764
Washington, D.C. 20554

Kerry E. Murray
Scott **A.** Shefferman
Julie M. Keamey
1133 19th St., N.W.
Washington, DC 20036

Counselfor WorldCom Inc.

*Claudia Fox
International Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

*Patricia Cooper
International Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

*Anita Dey
International Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

*John Rogovin
General Counsel
Office of General Counsel
Federal Communications Commission
445 – 12th Street, SW, Room 8-C750
Washington, DC 20554

Michael E. Glover
Karen Zacharia
Leslie V. Owsley
Verizon
1515 N. Courthouse Road, Suite 500
Arlington, VA 22201-2909

Patricia J. Paoletta
Jennifer D. Hindin
Suzanne Yelen
Heather O. Dixon
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, DC 20006

Counselfor Globe Telecom

Margaret K. Pfeiffer
Thomas R. Leuba
Sullivan & Cromwell LLP
1701 Pennsylvania Avenue, N.W.
Washington, DC 20006

Counselfor PLDT

William S. Pamintuan
Ricardo M. Dira
Digitel Telecommunications Phils., Inc.
110 E. Rodriguez, Jr. Ave.
Bagumbayan, Quezon City
Philippines 1100

Attention: Hon. Armi Jane R. Borje, Commissioner
National Telecommunications Commission
BIR Road
East Triangle
Diliman, Quezon City
Philippines

Henry Goldberg
Jonathan Wiener
Joseph Godles
Goldberg, Godles, Wiener & Wright
1229 19th Street, N.W.
Washington, DC 20036

Of Counselfor PLDT

Mark C. Rosenblum
Lawrence T. LaFaro
James J.R. Talbot
AT&T Corp.
1 AT&T Way
Bedminster, NJ 07921

Michael J. Mendelson
Jones Day
51 Louisiana Ave.
Washington, D.C. 20001

Counselfor Digicel Limited

Ana Maria Ablaza

Ana Maria Ablaza